NO. 22774

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT EDWARD TOOHEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U.S. Attorney,
Chief, Criminal Division
RONALD S. MORROW,
Assistant U.S. Attorney

1200 U.S. Court House
312 North Spring Street
Los Angeles, California 90012

Telephone: 688-2434
688-2413

Attorneys for Appellee
United States of America

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Attorneys for Appellee
United States of America

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I

STATEMENT OF JURISDICTION

On November 9, 1966, the appellant was indicted in two counts, by the Federal Grand Jury for the Southern District of California, Central Division, for the interstate transportation of a stolen motor vehicle and its concealment and storing, in violation of Title 18, United States Code, Sections 2312 and 2313 [C. T. 12].[1] Following a court trial before the Honorable John W. Delehant, Senior United States District Judge,[2] on January 16 and 17, 1967

1/ C. T. refers to Clerk's Transcript.

2/ Sitting by designation of Earl Warren, Chief Justice, United States Supreme Court.

the defendant was found guilty, and on February 14, 1967, appellant was committed to the custody of the Attorney General for eighteen months on each count, the sentences to begin and run concurrently [C. T. 33].

There was a Notice of Appeal filed on February 15, 1967 [C. T. 34].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2312, 2313 and 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

APPLICABLE STATUTES

Title 18 United States Code, Section 2312:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18 United States Code, Section 2313:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000

or imprisoned not more than five years, or both."

III

QUESTIONS PRESENTED

A. Whether there was probable cause for the stopping and subsequent arrest of the defendant.

B. Whether the prosecution was entitled to use and introduce into evidence the vehicle identification number of the automobile in the possession of the defendant at the time of his arrest.

C. Whether the defense was entitled to the identity of the informer for the purpose of questioning probable cause.

D. Whether Miranda v. Arizona shall be applied to exclude witnesses and their testimony found as a result of an address given by a person in custody when the statement was made with adequate constitutional warnings prior to the Miranda decision.

STATEMENT OF FACTS

The automobile referred to in the indictment, a 1964 red Thunderbird convertible, vehicle identification number 4Y85Z190110, was stolen from Automobile Sales, Incorporated, 95 Liberty Street, Springfield, Massachusetts [R. T. 220-21].[3/] The vehicle was

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3/ "R. T." refers to Reporter's Transcript.

stolen between January 20, 1966, and February 11 of the same year [R. T. 220-21].

In the early part of 1966 the defendant was talking to the former husband of Evelyn Schroeter and at that time told her husband that he drove a car from Springfield, Mass., to Los Angeles [R. T. 228]. The vehicle discussed was a Thunderbird [R. T. 229]. The defendant told Mr. Schroeter about changing the license and motor numbers and then driving it across country [R. T. 229]. At that time, Mr. Schroeter told Toohey he was crazy for doing such a thing [R. T. 229].

In January of 1966 the defendant told Daniel T. Hulette that he was going to Springfield [R. T. 259], and then, after January, told Hulette that he had a car for sale [R. T. 256]. At various times Toohey offered the car, a red Thunderbird convertible, to Hulette and also others [R. T. 260, 269, 272].

On January 27, 1966, the defendant, in Panorama City, California, had "a sharp red T-Bird" which was a convertible with a black top and white upholstery [R. T. 282-83].

Inasmuch as the defendant has challenged the legality and propriety of his arrest and subsequent investigation reference is made to that arrest and the events leading up to it.

In the early afternoon of March 30, 1966, Sergeant Francis M. Wheeling, of the Intelligence Division of the Los Angeles Police Department, received word from an informant of his that a 1965 red Thunderbird convertible, with a black top, would arrive at the Golden Lion Restaurant on Santa Monica Boulevard at approxi-

mately 9:00 P.M. that night [R.T. 10-11]. The car would have Massachusetts license plates and one of the occupants would be Robert Schroeter, alias Red Kelly [Red Kelly [R.T. 11]. The car was supposed to be stolen and had been offered to the informant for $400 [R.T. 11]. The driver was described as a male caucasian, slender, dark complected [R.T. 11], and was from the San Francisco area [R.T. 41].

Prior to March 30, 1966, Wheeling had been told by two Federal Agencies that the informant "was absolutely reliable and had proven so to these federal agencies on numerous occasions in the past" [R.T. 12]. Wheeling was told the informant had earned $20,000 during 1965 in informant's fees [R.T. 12]. Personnel of the Post Office Department had told Wheeling that the informant had broken several rings, "including a large forgery and counterfeiting ring located in Canada, and that he managed to recover large quantities of counterfeit currency, of stolen bonds, and other related-type violations [R.T. 165]. Wheeling was also told by a Postal Inspector that the informant "had been on numerous operations with the Federal Bureau of Investigation on which agents had been, at least on one occasion, an agent was shot; that he was considered to be top notch and a very unusual type of person, but very reliable as a source of information relating to the workings of the underworld" [R.T. 165].

Wheeling's personal dealings with the informant were that in the three week to one month period prior to March 30, the informant had given him information [R.T. 12]. In each instance

when information was received by Wheeling, he verified it personally [R. T. 12].

As a result of information received by Wheeling from the subject informant, five persons were arrested for armed robbery of a jewelry store in the San Fernando Valley, three persons were arrested in possession of a half million dollars' worth of stolen bonds, three persons were arrested and $29,500 worth of American Express money orders were recovered, and two other persons were arrested for armed robbery [R. T. 13].

Wheeling considered the informant to be a very valuable source of information [R. T. 13].

On March 28, 1966, the informant had told Wheeling that Red Kelly and the driver of the car on the 30th, had come to the informant for the purpose of borrowing a gun so Kelly and the driver could rob a jewelry salesman in the Beverly Hills area [R. T. 162-63]. Wheeling, in conjunction with the Beverly Hills Police Department, conducted surveillance and saw Schroeter, aka Kelly, following the salesman [R. T. 163].

Around 6:00 P. M. on March 30, Wheeling telephoned Lieutenant Kenneth R. Hayes, of the Los Angeles County Sheriff's Office and requested his help at the area of Spaulding and Santa Monica at 9:00 P. M., relative to a stolen 1965 Thunderbird, red in color [Testimony of Hayes R. T. 184-85; Testimony of Wheeling R. T. 14-15; 42-44].

At approximately 9:00 P. M. on March 30, 1966, Sergeant Wheeling, along with personnel of the Los Angeles Police

Department and the Sheriff's Office observed a vehicle matching the description given by the informant, with Red Kelly in the car [R. T. 16]. The vehicle's escape was blocked and Wheeling approached the driver [R. T. 17-19], the defendant Toohey [R. T. 22]. The following colloquy took place:

1. Wheeling asked the defendant for his operator's license [R. T. 22].

2. The defendant said, "I don't have one" [R. T. 22].

3. Wheeling asked Toohey for his registration on the vehicle [R. T. 22].

4. Toohey said, "No" [R. T. 23].

5. Wheeling asked to whom the car belonged [R. T. 23].

6. Toohey said, "I don't know" [R. T. 23].

7. Wheeling asked where he got the car [R. T. 23].

8. Toohey said he borrowed it from "[s]ome guy in a bar named Jerry" [R. T. 23].

9. Wheeling asked, "What bar ?" [R. T. 23].

10. The defendant said, "I don't remember" [R. T. 23].

11. Wheeling asked for Jerry's last name [R. T. 23].

12. Toohey said, "I don't know" [R. T. 23].

13. Wheeling asked where the bar was located.

14. Toohey said, "Somewhere in Hollywood. I don't know exactly" [R. T. 23].

At that time Wheeling told Toohey to get out of the car and place his hands on top [R. T. 23]. At that time Wheeling told Toohey he was under arrest and Wheeling saw an officer holding

a pair of license plates on the other side of the vehicle [R. T. 23], California license plates [R. T. 24].

After Sergeant Wheeling told Toohey to get out of the car and told him he was under arrest, Wheeling advised Toohey that he had the right to remain silent, anything he said could be used against him in a legal proceeding, and he was entitled to an attorney prior to making any statement [R. T. 155-56]. Toohey said he understood his rights [R. T. 156].

Michael B. Moore, a deputy sheriff, impounded the Thunderbird at Spaulding and Santa Monica that night and as part of the impounding procedure took down the vehicle identification number -- 4Y85Z190110 [R. T. 180-81], as had Wheeling [R. T. 174].

Wheeling, at the hearing on the motion to suppress, described the area of the Golden Lion as one "very active for law enforcement officers" [R. T. 150].

On April 1, 1966, Special Agent Gerald F. Moore, of the Federal Bureau of Investigation, received a phone call from Sergeant James Heinsdorff of the Burglary - Auto Theft Detail of the Los Angeles Police Department who told Moore of the vehicle and its license number and vehicle identification number -- 4Y58Z190110 [R. T. 198-99].

Moore, on April 4, 1966, after advising Toohey of his constitutional rights, except for the right to have a free attorney appointed then and there, asked for and received the address of the defendant [R. T. 191-93]. Moore's reasons were at least

two-fold: (1) to locate Toohey in the event he became a fugitive, and (2) to conduct a neighborhood canvass relative to the crime [R. T. 194].

Judge Jesse W. Curtis made the factual finding that Toohey was not under arrest at the time of his initial stopping and questioning on March 30, 1966 [R. T. 59]. Judge Curtis found:

> "Up until the time the license plates were shown to the defendant that the investigation was purely in the investigatory stage, and the accusatory stage did not occur until the time of the arrest, the license plates being the thing that in the mind of the officer cinched the identification."

Judge Delehant, it is submitted, found that any persons found as a result of an address were so attenuated as to not be tainted by an assumed taint [R. T. 196].

ARGUMENT

A. THERE WAS PROBABLE CAUSE FOR THE STOPPING AND EVENTUAL ARREST OF TOOHEY.

At the time Toohey was stopped the police had information that the car was stolen; it had been offered for sale at $400; it was a red 1965 Thunderbird convertible with Massachusetts plates; Red Kelly and a dark-complected slender man would be in it; and the car would be at the Golden Lion at 9:00 P. M.

The information received by the police had come from an informant whose reliability had been verified and vouched for on numerous occasions, and, in particular, was verified when the described car appeared at the predicted time with the predicted occupants.

Factually, and legally, Draper v. United States, 358 U.S. 307 (1959), tells us that there was probable cause to make an arrest in the instant case.

In any event, Sergeant Wheeling confirmed in his own mind the fact that the car was stolen by virtue of the colloquy that took place between himself and Toohey prior to the arrest.

It is noted that Judge Curtis made the finding that the matter was in the investigative stage up until the time Wheeling saw the California plates in the hand of another officer after they had been removed from the car.

Appellant urges that Toohey was under arrest from the moment he was stopped.

Not every stopping of an auto by a police officer is an arrest of the driver. United States v. Bonanno, 180 F.Supp. 71, 80 (S.D. N.Y. 1960), rev'd on other grounds sub nom., United States v. Bufalino, 285 F. 2d 408 (2nd Cir. 1960). The principle that the police may routinely interrogate an individual without arresting him was also recognized in Rios v. United States, 364 U.S. 253 (1960). The Court's attention is directed to Busby v. United States, 296 F. 2d 328 (9th Cir. 1961), cert. den., 369 U.S. 876 (1962). In Busby, at 332, this Court stated that it agreed with

Bonanno, supra., and, further, that not every stopping is deemed an arrest.

Appellant says that since he was effectively restrained when first stopped then that must be the time of the arrest. The recent case of Terry v. Ohio, _____ U. S. _____ 3 Cr. L. 3149, decided June 10, 1968, holds that police may, if they believe a crime has been or is about to be committed, the right to detain a person and investigate the situation. Terry also holds that during such detention the police have a right to protect themselves. In light of the fact that Wheeling knew that Kelly and his companion tried to borrow a gun for the purpose of a robbery two days earlier, coupled with the fact that the area of stopping was one "very active" for law enforcement, anything less than the use of shotguns would have been foolish on the part of the police.

This court, in Gilbert v. United States, 366 F. 2d 923 (9th Cir. 1966) said, at 928:

> "There is nothing ipso facto unconstitutional in the brief detention of citizens not justifying an arrest, for purposes of limited inquiry in the course of routine police investigations; and the test of the validity of such brief detention is whether from the totality of this circumstance, it appears that the detention was based upon 'reasonable grounds' and was not arbitrary or harassing."

It is submitted that the police in the instant case acted perfectly reasonable under the circumstances.

B. THE PROSECUTION WAS ENTITLED TO INTRODUCE THE VEHICLE IDENTIFICATION NUMBER INTO EVIDENCE.

At the time of the arrest, the vehicle in question was impounded by the Los Angeles County Sheriff's Office, and, as part of the impounding procedure Michael Moore wrote down the vehicle identification number on his impound sheet. Prior to that Sergeant Wheeling wrote down the same number contemporaneously with the arrest. In any event, on April 1, 1966, Special Agent Gerald Moore, of the F. B. I., was provided with the number by Sergeant James Heinsdorff of the L. A. P. D. Burglary-Auto Theft detail. On April 5, 1966, Moore, of the F. B. I., went to the impound lot and, without a search warrant, took down the number again.

Assuming arguendo, that Preston v. United States, 376 U.S. 364 (1964), makes Gerald Moore's obtaining of the number illegal, the number was obtained from independent untainted sources -- the search at the time of the arrest, and the impound report. Wong Sun v. United States, 371 U.S. 471 (1962); Nardone v. United States, 308 U.S. 388 (1939). Even if Moore's obtaining of the number was wrong, the number itself was admissible.

C. THE DEFENSE WAS NOT ENTITLED TO THE IDENTITY OF THE INFORMER.

Toohey relies on Roviaro v. United States, 353 U.S. 53 (1957), for the proposition that he was entitled to know the identity of the informer at the hearing on the motion to suppress. While appellant cites Roviaro at page 61, for the proposition that for a test of probable cause the accused is entitled to such identity, it is clear that such language of Roviaro is dicta. Rugendorf v. United States, 376 U.S. 528 (1964), at page 535, line 5, states that "reliance on Roviaro for suppression purposes, . . . [is] entirely misplaced."

It is the law of this Circuit that the trial judge has discretion in revealing the name of an informant. Costello v. United States, 298 F. 2d 99 (9th Cir., 1962); cert. den., 376 U.S. 930; Newcomb v. United States, 327 F. 2d 649 (9th Cir. 1964), cert. den., 377 U.S. 944. As Costello points out, the question is whether or not, without the informant, the prosecution can demonstrate that they had probable cause and the right to rely on such information. It is submitted that the reliability of the informant and his existence are amply demonstrated by the statement of facts, supra.

Appellant says he was entitled to know the name of the informer because of "his own participation in the offense" [Op. Brief, p. 9]. Appellant offers proof of such participation because "the informer had been offered the car in sale by the appellant"

[Op. Brief, p. 10]. Such argument overlooks the fact that the offense charged is transportation, and concealment, not disposition.

As appellant concedes, the duty is on the appellant to show the participation, and such has not been done in the instant case.

As this Court said in Powell v. United States, 386 F. 2d 386 (9th Cir. 1967), at 387-88:

> "A rule that any person who merely informs the officers of the commission of a crime must be disclosed to the accused as the one responsible for his arrest would serve to encourage the criminal to wreak his vengeance on the informer. Such information might be hard to come by; and such a rule would seriously hamper accepted police investigative techniques.
>
> "If there was an informer in this case, there is nothing to show that he was more than a mere observer, not a participant." . . .

D. MIRANDA DOES NOT REQUIRE THE SUPPRESSION OF TWO WITNESSES FOUND FROM AN ADDRESS WHICH WAS LAWFULLY OBTAINED BY THE POLICE AND THE F. B. I.

The arrest in the instant case took place on March 30, 1966, and at that time Sergeant Wheeling fully and properly advised Toohey of his rights [R. T. 155-56]. The F. B. I. interviewed Toohey

on April 4, 1966, and again advised him of his rights [R. T. 191]. The F. B. I. obtained the defendant's address on April 4 in an interview. The police obtained it as part of the normal booking procedure on March 30 [R. T. 156].

In any event, the F. B. I. went to the address in a routine neighborhood canvass and eventually located Mrs. Harris and Mrs. Kitzler [R. T. 109-P].

The novel theory advanced by the defendant is that even though the address was obtained during routine booking and also after being properly advised of his rights as of the time of the warning, Miranda makes evidence obtained from a mere address inadmissible. It is submitted that neither Miranda, or any other case, so holds. It is incontestable that, at the time, Toohey was given a full and proper warning. It is further incontestable that no admissions made by Toohey were introduced at the trial.

Nowhere in Miranda does it say that the fruit of an otherwise valid statement may not be used after Miranda, or that statements previously obtained according to Escobedo become illegal or unconstitutional. Johnson v. New Jersey, 384 U. S. 719 (1966) merely holds that statements obtained before June 13, the date of the Miranda decision, may not be introduced after June 13, not that the statements are ipso facto illegal or unconstitutional or tainted in any way. For this Court to so read Miranda would be an unwarranted extension of Miranda and would castigate officers who did everything right at the time.

While it is the basic position of the United States that Miranda does not apply, it is submitted that a mere address, assuming arguendo that it is tainted, is so far attenuated from witnesses found in a neighborhood canvass at that address that the primary taint would be purged. Between the address and Mrs. Harris and Mrs. Kitzler there are intervening factors such as investigation, the free will of the witnesses, time, and the memory of the witnesses. To say that such witnesses are not products of their own free and voluntary will would be a complete distortion of Wong Sun, supra; and Nardone v. United States, supra. As appellant reads the Reporter's Transcript at pp. 195-97, so does the appellee. Judge Delehant found a break in the casual chain between the address, per se, and witnesses found at or near the address.

It is further submitted that the mere address of a defendant is not covered by the Fifth and Sixth Amendments because it is mere identifying information. See Gilbert v. United States, supra. As Judge Curtis said,

> "[An address of a defendant] is the type of identifying information which just isn't protected by Miranda . . . Like fingerprints or anything else."

E. CONCLUSION

For the above stated reasons this judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

RONALD S. MORROW
Assistant U. S. Attorney

Attorneys for Appellee
United States of America